INTERSTATE COMMERCE LEGISLATION

INTRODUCTION

TO

CLARK ON INTERSTATE COMMERCE

By

FRANCIS B. JAMES

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Chairman Committee on Commerce, Trade and Commercial Law of the American Bar Association.

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PUBLISHER'S PREFACE.

The undersigned have published a volume in cloth binding entitled "Clark on Interstate Commerce" containing the testimony given by Hon. Edgar E. Clark (a member of the Interstate Commerce Commission) before the Senate Committee on Interstate Commerce pertaining to proposed inerstate commerce legislation with an Introduction by Francis B. James (Chairman of the Committee on Commerce, Trade and Commercial Law of the American Bar Association) together with the Pomerene-Esch Bill and an index to Mr. Clark's testimony. This pamphlet in paper cover is a reprint of said "Introduction" and is a manuscript copy for private circulation.

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INTERSTATE COMMERCE LEGISLATION

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(*a*) *Preliminary.*

The world conflict has come and gone, and during that trying period the United States Government, as a war measure, has largely conducted the country's transportation. The actual experiment of Government operation has generally crystalized public sentiment against it as a permanent policy, and against its continuation for even five years after a formal proclamation of peace.

The period of thirty-two years since the approval by the President on February 4, 1887, of the Act to regulate commerce, has been rich in experience, and has demonstrated that in view of both old and new economic conditions, amendatory and supplemental legislation should be enacted before the return of interstate common carriers to private ownership and operation.

Many plans have been submitted to the Senate Committee on Interstate Commerce by both the biased and unbiased, the leading among the former being the Association of Railway Executives and the National Association of Owners of Railway Securities, and the chief among the latter being Hon. Edgar E. Clark, a member of the Interstate Commerce Commission for a dozen years past. His testimony is so disinterested and the fruit of so long an experience that it comes more nearly to being a guide for future legislation than that of any other witness. The insinuation contained in the questions put

by a former Senator from Illinois (pages 372-373)* instead of weakening has only added weight to Mr. Clark's statements.

(*b*) *The Keynote.*

One note that rings sharp and clear throughout Mr. Clark's testimony as to transportation (and which is resounding throughout the economic world as to all other economic activities) is that both cooperation and consolidation on the one hand and competition on the other must be limited, controlled and regulated in order that the good of each shall be preserved and the bad destroyed. Unregulated, uncontrolled and unlimited cooperation and consolidation are harmful to the public weal, while controlled, regulated and limited cooperation and consolidation are in the public interest. Uncontrolled, unregulated, and unlimited competition of itself tends toward either monopoly or bankruptcy and is wasteful and not for the general welfare, while controlled, regulated and limited competition is economically sound and to the benefit of the whole social fabric including therein the economic element. This appears from the following colloquy, p. 254):

> "*Senator Watson:* * * * Mr. Commissioner, as I understand the report of the Commission, you are in favor of the elimination of all competition; is that right?
>
> "*Commissioner Clark:* Except the competition of service.
>
> "*Senator Watson:* How do you distinguish between 'competition of service' and other kinds of competition if you would have the railroads operated as a unified whole?

*Page references are to the pages of Mr. Clark's testimony as same appears in the official report of hearings before the Senate Committee on Interstate Commerce.

"*Commissioner Clark:* Our suggestion is not so complete a unification as exists at the present moment. *Our suggestion is for the elimination of unnecessary and wasteful competition* (italics mine*); and, speaking only illustratively, it has not been my thought at all that if the Commission were endowed with the power that is here suggested it exercise it to the extent, for example, of permitting consolidation or merger of the New York Central system and the Pennsylvania Railroad system; but there may be a good many small roads between them, connecting with one or the other of them, which it would be in the public interest to have one or the other of them absorb and make it part of a big healthy member of society.

"*Senator Kellogg:* I do not understand that you believe that all competition as to service between the great carrier lines of this country should be eliminated?

"*Commissioner Clark:* Not at all, Senator.

"*Senator Watson:* No."†

(c) *A New Jurisprudence.*

A New Jurisprudence has grown up in America under which right and justice have been sanely, quickly, and cheaply meted out through modern administrative tribunals—and it has been the highly successfully work of the Interstate Commerce Commission that has pointed the way. The Panama Canal Act, the Federal Trade

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*The term "italics mine" means that the italics are those of the undersigned.

†The formal memorandum submitted by Mr. Clark on behalf of the entire Commission except Mr. Commissioner Woolley (p. 235), stated: "Obviously competition between carriers that is wasteful or unnecessarily expensive lays an added burden upon the rate payers. Elimination of wasteful or unduly expensive competition in rates or service is desirable." The colloquy quoted in the text (in that it deals with both undue consolidation and unreasonable competition) is more helpful in guiding economic thought than the matter quoted in this footnote, although the latter very aptly supplements the former.

Commission Act, the Clayton Act, the 1916 Amendment to the Federal Reserve Act, the Shipping Board Act, and the Webb-Pomerene Act have followed in its wake.

The time has come when society recognizes that reasonable cooperation and consolidation, and rational competition can be brought about by being limited, regulated and controlled by duly established administrative bodies. Neither reasonable cooperation and consolidation nor rational competition should be destroyed by hard and fast rules of law whose principal sanctions are grand and petit juries and penal institutions.

(d) Extent of Regulation.

"Government regulation of corporations engaged as common carriers," says Mr. Clark (p. 232), "should reach the corporate activities wherever those activities may lawfully go in serving the public as interstate carriers."

(e) Complete Merger in Time of War.

Mr. Clark wisely suggests that Congress should now (p. 232) provide by law for the prompt merger of all carriers' lines, facilities and organization into a continental and unified system in time of war under which the President should be authorized to assume possession and control and operate same. It is suggested by the undersigned that such law provide that in exercising such power the President should do so through the existing corporate organizations as his agencies.

Mr. Clark goes still further and suggests (pp. 232-3) the giving of such power in times of national stress or emergency not growing out of war. The wisdom of this suggestion is open to the gravest question.

(f) Unnecessary Road Building.

Interstate railroads should only be constructed when necessary and convenient to the public and Mr. Clark points

out (p. 233) that a certificate of "public convenience and necessity" be first secured.

(g) Power to Require Railroads to Extend Their Lines

The new legislation (says Mr. Clark) should give the Interstate Commerce Commission power to require common carriers to extend short lines, spur lines and spur tracks to communities and industries under reasonable limitations (p. 233).

(h) Fair Wages a Proper Factor in Rate Making.

That fair wages to be paid labor is conducive to efficiency and a proper factor in rate making is lucidly expounded by Mr. Clark (p. 235).

(i) Wages and Conditions of Employment.

Mr. Clark expressed the opinion (pp. 239-240) that the Interstate Commerce Commission should not be vested with power to adjudicate questions of wages and conditions of employment but that the Newlands Act is adequate to deal with these questions.

(j) Uniform Depreciation Charge.

Mr. Clark (p. 240) demonstrated that there could not be a uniform depreciation charge because to have such uniform depreciation charge would disregard divergent operating conditions and that the present law is adequate to deal with the question.

(k) Mileage Scales and Grouping.

Rate making is not a purely mathematical problem but a commercial one in which economic factors must be con-

sidered. Mere mathematical rate making is not of itself scientific rate making and no rate making is truly scientific which does not consider the actual affairs of commercial life. It is true there are situations and conditions where mathematical rate making is sound economic rate making. Every true student of the subject should read with the greatest care what Mr. Clark had to say (pp. 241-2) on the subject of grouping in his testimony before the Senate Committee.

(*l*) *Initiating Rates.*

The general power to initiate rates should be left with the carriers. Experience shows that the Commission should also be given power to initiate rates.

(*m*) *War Expenses.*

The extraordinary cost of conducting the railroads by the Government during the war period for war purposes, including the abnormal prices paid for additions and betterments made for war purposes should be paid out of the public treasury and should not be saddled on the carriers, to be in turn borne by the shipper. The new law should expressly provide that the railroad should not be bound by the unconscionable contract forced upon the railroads by the Administration, and that the carriers be bound only to the extent of the normal value of such additions and betterments. This though it expressed in a dialogue between Senator Cummins and Mr. Clark (pp. 284-285) as follows:

> "*Commissioner Clark:* And whatever course is adopted, I do not believe that the Government will ever come out of this thing with enough earnings from these railroads to pay the obligations which the Government must meet as the result of its taking them over.
>
> "*Senator Cummins:* I agree that if the Government operates the roads, for any inefficiency or want of

economy that may be found in that operation, I suppose the shippers will have to pay for it; but the roads being operated for war purposes, if they do not earn the income that is necessary to make good the guaranty, it ought to be paid out of the Treasury and not extorted from the shippers of the country, ought it not?

"*Commissioner Clark:* Under those circumstances, it seems to me a very proper part of our war expenses.

"*Senator Cummins:* And it is not likely that the Interstate Commerce Commision would adjust rates so that deficits which were occasioned by war movements would be taken from or made up by the shippers, is it?

"*Commissioner Clark:* We have never adjusted rates on any such principle."

It would appear to have been the clear intent and purpose of the Railroad Control Act of March 21, 1918 (40 Stat., 451) by the provisions of sections 1, 3 and 4, paragraphs 2 and 3 of section 6, that the war-time cost of additions and betterments made necessary by war-time conditions should not be saddled upon the railroads but only the cost in normal times. The Railroad Administration seems to have sought to frustrate the obvious intent and purpose of the law by providing in paragraph (b) of section 8 of Forms "A" and "B" of April 5, 1919, of the Agreement between the Director General of Railroads and the Railroad Companies, the following: "*Provided, however,* That no loss shall be claimed by the Companies and no money shall be due to it* in respect of such additions and betterments upon the ground that the actual cost thereof at the time of construction was greater than under other market and commercial conditions and for the purpose of determining such controversy the amount paid for any addition or betterment shall be deemed the fair and reasonable cost thereof and shall be taken as the basis for such determination."

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*"Them" in form "B."

(*n*) *Merger of Carrier Lines.*

The second primary thought expressed by Mr. Clark on behalf of the entire Commission except Mr. Woolley, is as follows (p. 233): "Merger within proper limits of the carriers' lines and facilities in such parts and to such extent as may be necessary in the general public interest to meet the reasonable demands of our domestic and foreign commerce. The thought underlying this is that it might become necessary or be found desirable in the general public interest to permit, encourage or require carriers within limits as to extent, territory and time to merge their lines and facilities or the operation thereof. The exercise of such a power would necessarily be an administrative function."

This presents two questions, one as to permissive and the other as to compulsive merger.

As to permissive merger four classes of cases present themselves:

(*a*) The substantially non-paralleling and, therefore, non-competing lines whose consolidation would form a continuous line;

(*b*) The feeding lines originating traffic (p. 274) lateral to the trunk lines and, therefore, non-competing;

(*c*) The short lines wholly or partially competing, whether originating traffic or not;

(*d*) The more or less paralleling and therefore competing trunk lines.

As illustrating class (*a*) would be the merger of the New Haven with the Pennsylvania, as pointed out by Mr. Clark (p. 269); or a system extending from the Atlantic to the Pacific or from the Great Lakes to the Gulf (p. 255).

A merger of class (*b*) and class (*c*) with each other or with a trunk line as shown by Mr. Clark (pp. 242, 243, 254 and 255), would be proper and the Sherman anti-trust law and the Clayton act should be modified accordingly (p. 243),

so as not to cover such cases as are approved by the Commission.

The new law should permit the consolidation of the foregoing classes (*a*), (*b*) and (*c*) when found by the Interstate Commerce Commission to be in the public interest and what has just been said as to the Sherman anti-trust law and Clayton act is applicable thereto.

At this point, however, the line should be sharply drawn and the new law should specifically state that no merger or consolidation by sale, lease, stock ownership, community of interest or otherwise should be permitted as to class (*d*) roads. As an illustration Mr. Clark pointed out (pp. 254 and 274) that a merger of the New York Central system and the Pennsylvania system should not be permitted.

Mr. Clark presents (p. 255) strong disapproval of any regional subdivision of the country or regional merger or consolidation of lines. Senator Gore expressed the opinion (at p. 255) that such regional systems would be artificial, reverse the law of progress and tend toward disintegration rather than integration.

The new law should not only be permissive and encourage such mergers with limitations strongly and clearly expressed against the merger of substantially paralleling and competing trunk lines in said class (*d*), but should provide for such compulsory merger of said class (*a*), (*b*) and (*c*) lines within the constitutional limits of due process of law when found by the Interstate Commerce Commission to be in the public interest.

Senator Underwood (pp. 273, 274) seems to have thrown some confusion into the discussion as to compulsory merger. There was some saving grace in the statement of Mr. Clark (pp. 274-5) that permissive merger be refused unless a willing short line be included in such merger.

(*o*) *Common Use of Equipment.*

The law now provides for the interchange of equipment in the case of through routes and to be reasonable should be on a car for car basis with an appropriate per diem. Each carrier in a through route should furnish and be compelled to furnish its proportional part of such equipment. Mr. Clark suggests (p. 237) the pooling of equipment. The pooling of equipment is but another name for the common use of equipment. The pooling of box cars would seem to be appropriate but the law should place close limitations on the pooling of open top cars and possibly on other forms of equipment. Not only should carriers be permitted to pool box cars, but when in the public interest compelled to do so. If it is thought wise to extend the pooling authority to cars other than box cars there should not only be permissive pooling but compulsory pooling when found in the interest of the public by the Interstate Commerce Commission.

The new law should not merely permit the Commission to require carriers to make car service rules a part of their tariff publications but the law should make same mandatory.

(*p*) *Obligation to Furnish Equipment.*

The Interstate Commerce Commission today is without power to require a carrier to provide equipment (p. 237). The new law should authorize the Interstate Commerce Commission to require a carrier to provide and furnish equipment both as to quantity and kind—both general and special.

(*q*) *The Private Freight Car.*

Mr. Clark points out that there should be limitations on the right of a shipper to supply a private freight car (p. 237). The new law should contain detailed rules on this

subject. The private car owners secure special assignments of their private cars and thus secure preferential use of locomotives, road bed and terminals, over other competitors who do not own private cars.

(*r*) *Motive Power.*

The new law should give the Commission power to require carriers to furnish ample motive power.

(*s*) *Standardization of Equipment and Motive Power.*

If the new law gives the Interstate Commerce Commission (p. 237) power over the standardization of equipment, the undersigned suggests it should be somewhat limited, and so far as cars are concerned the standardization should be confined to box cars. It is very doubtful whether it should be extended generally to locomotives because the local conditions are so dissimilar that a locomotive of one standard of high efficiency in one locality would be of low efficiency in another locality.

(*t*) *The Common Use of Terminals.*

As to common use of terminals Mr. Clark said (p. 237): "A more liberal use of terminal facilities in the interest of proper movement of commerce. Here again a broad revision of the limitations upon co-operative activities among the carriers would naturally bring a more liberal use of the existing terminal facilities and would undoubtedly bring about agreements between competing carriers under which existing terminal facilities would be opened to traffic which is now and heretofore has been excluded. If the regulating body is empowered to require adequate service it could require the enlargement of terminals, if that action were necessary in the public interest, and could require that ter-

minals be opened to traffic in so far as is reasonably and properly in the interests of the commerce of the locality. Where this power was exercised, the regulating tribunal would, as a matter of course, determine the reasonable compensation to be paid to the owning carrier for the use of its property by the carriers or traffic so using that property."

The opinion of Mr. Justice Lurton in the St. Louis Terminal Case (224 U. S., 383) is an interesting study of the problem and of the question of competition in service (at p. 393).

The carrier should not merely be permitted to agree to the use of terminals in common, but the Commission should be permitted by express provision of law to require common use of terminals and require the building of new and the enlargement of old terminals.

(*u*) *Supervision of Service and Physical Operation.*

That the Interstate Commerce Commission must be given full, ample and complete authority over service and physical operation of carriers, is most forcefully stated by Mr. Clark (pp. 236, 253, 254, 275, 358-360). This is by far one of the most important new powers that should be conferred on the Interstate Commission Commission. The shippers should not fail to see that Congress confers this power in the most ample and complete form possible.

(*v*) *Minimum Rates.*

Mr. Clark argues most convincingly in favor of vesting in the Interstate Commerce Commission power to prescribe not merely maximum but minimum rates (pp. 234, 235, 367, 374) and shows that it would thus be placed beyond the power of a carrier to upset a reasonable rate adjustment (p. 235) or kill or keep killed water transportation (p. 234).

Of course this power should be limited so as not to prevent a carrier from developing traffic, a function pointed out by Hadley (Railroad Transportation, p. 17) as the most important in American railroading.

(*w*) *Issue of Securities.*

Mr. Clark has demonstrated (p. 235) that there must be an "emancipation of railway operation from financial dictation." This can be accomplished by vesting in the Interstate Commerce Commission power to "regulate" the issue, sale, pledge and disposition of securities (pp. 351-2). As put by Senator Pomerene (p. 271) and concurred in by Mr. Clark (p. 271) to stop the railroad financial poker game.

(*x*) *Control of Expenditures.*

The full significance of Mr. Clark's suggestion that the new law should provide that the Commission should have control over expenditures and funds and that the same should not be diverted can not in justice be epitomized and should be read in full (Mr. Clark, pp. 245, 246, 247, 351, 352).

(*y*) *Interlocking Directors.*

Mr. Clark suggests (p. 236) that the provisions of the Clayton act be extended as to common or interlocking directors, whether the carrier corporations are or are not competitors.

(*z*) *Adequate Revenue.*

Adequate revenue is necessary for efficient service (p. 237). Mr. Clark (pp. 237-8) has expounded this subject with wonderful clearness. 'Adequate revenue, however, to operate a railroad as an instrument of transportation is quite different from the raising of revenue to pay interest or divi-

dends on capitalization which capitalization is not entitled to interest or dividends (Mr. Clark, p. 249) or to pay rental on leases whose terms shock the conscience.

(*z-1*) *Pooling of Freight and Division of Earnings. . .*

The pooling of physical equipment, such as box cars, is proper. The pooling of freight and a division of earnings based thereon is fraught with danger. Pooling of freight with a division of earnings is unlike a merger. Pooling of freight with a division of earnings entirely ignores capital. A pooling of freight with a division of earnings is not a consolidation of all the activities of a carrier, while on the contrary a merger is a consolidation of each and all the activities of the carriers involved. A pooling of freight with a division of earnings is a hybrid—neither flesh nor fowl. A pooling of freight with a division of earnings means either no competition of service or unreasonable, abnormal and excessive competition in order to make a showing for a subsequent division of earnings.

Congress, by Section 5 of the Act to Regulate Commerce, provided as follows: "That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof." Congress thereby tore up the pooling of freight and a division of earnings therefrom by the roots and branches and what was wise then is wise today.

The memorandum submitted on behalf of the entire Interstate Commerce Commission, except Mr. Woolley, does not specifically or by name cover the subject of pooling of freight and division of earnings based thereon.

The following dialogue between Senator Poindexter and Mr. Clark should be the subject of careful study (pp. 248-9):

"*Senator Poindexter:* Why could they not be required, under the power of the Congress, to regulate interstate commerce, to pool their earnings, and divide them?

"*Commissioner Clark:* Senator, that would be a part of and covered by the suggestion which we have made here of the revision of the limitations upon the competitive activities of the carriers. Our suggestion is that not only ought there to be opportunity to absorb into the larger systems the poor and weak railroads that are unable to furnish the right kind of service, and unable to further finance themselves, but that there should be a wiping out of the limitations upon the consolidation or unification of the carriers' competitive facilities and lines, to such extent as may be approved by the designated Federal authority after full investigation and public hearing, so that everybody may know what the proposition is; so that everybody may know what is said in support of it; so that everybody may know what objections, if any, are advanced; and a report of that tribunal or authority, whatever it was, on the subject would state to the public what ought to be done, and why it ought to be done, and there would be no public interest injured that we can see.

"*Senator Poindexter:* That would remove the difficulty you have just mentioned, of having to make the rate for both lines, so that the more expensive one should earn a dividend?

"*Commissioner Clark:* Well, I did not go so far as to suggest that the more expensive one should earn dividends because there are some of them that never can earn dividends on their present capital under any rate that would be considered.

"*Senator Poindexter:* What is your solution of the problem you have just mentioned, where the rate would be profitable to one road and not profitable to the other?

"*Commissioner Clark:* A rate that would give them a reasonable return on the property that they devote to the public service.

"*Senator Underwood:* If you had the power to fix the rate—not a rate that would be reasonable so far as the specific charge on a ton of pig iron or a basket of feathers is concerned, but a reasonable rate that would yield a fair return on the investment in the property actually devoted to the public service—the commission would discriminate as to how much of that capital investment was fictitious and how much of it was real?

"*Commissioner Clark:* Yes."

The following colloquy appears in the report of the hearings before the Senate Committee (at p. 243):

"*Senator Gore:* The Interstate Commerce act prohibits pooling. Do you not think that act should be modified so that roads which do not merge or consolidate may be permitted to enter into reasonable pooling arrangements?

"*Commissioner Clark:* What I have said would go to that proposition also."

Mr. Clark has clearly pronounced himself against the consolidation of trunk lines such as the New York Central and Pennsylvania lines, and in favor of pooling of cars. Answers to leading questions such as those put by Senator Gore must be carefully weighed. This answer by Mr. Clark to this leading question by Senator Gore is not to be taken as the final word upon the subject of pooling of freight and division of earnings. It is neither merger nor consolidation. It is a most dangerous form of arrangement and does not carry with it the benefits of a real merger or consolidation when each and every activity, financial, operating and traffic are indissolvably bound together and interrelated to and dependent upon each other.

(*z-2*) *Competitive and Non-Competitive Traffic.*

"There would seem to be no occasion for different charges, terminal or otherwise," said Mr. Clark (p. 236), "as between so-called competitive and so-called non-competitive traffic," if proper limitations are observed.

(*z-3*) *Transit.*

Within the limitations suggested, Mr. Clark says (p. 236) there would be no occasion "for many of the old annoying and expensive restrictions surrounding milling and other services in transit." The transit practice tends to the diffusion of industry, as pointed out by Mr. Commissioner Meyer in the Fabrication-in-Transit case (29 I. C. C. R., 70, at p. 76) and is in the public interest as pointed out by Mr. Commissioner Prouty in the Foating Cotton case (8 I. C. C. R., 121, at p. 133), and the law should be amended so that transit practices may be widely extended to many new subjects not yet sanctioned by the Interstate Commerce Commission.

(*z-4*) *Rail and Water.*

Mr. Clark spoke most eloquently (pp. 234, 235, and 255) in favor of the development and encouragement of inland water ways and co-ordination and articulation (by inferference) of rail and water transportation systems. Abnormally low rail rates have been published in the past for the avowed purpose of killing water traffic and the law now unwisely provides a method of eternal sleep for such water transportation. This should be repealed and the Commission given power to prescribe minimum rates (p. 234), and thus take a deadly weapon out of the hands of the rail carriers. In addition to mandatory provisions for joint through rates and divisions thereof, man-

datory provisions should be enacted for proportional or ex-water rates applicable to traffic coming from or going to the water ways, whether such traffic comes from a water common carrier or a water private carrier, because nearly all the heavy bulk traffic such as coal is carried on the inland water ways by private carriers.

(*z-5*) *Routing.*

Mr. Clark's criticism (p. 243) of absolutely free routing is well taken. Section 15 of the Act to Regulate Commerce, as amended, gave the Commission power to prescribe exceptions and regulations as to free shippers' routing in one breath, and took it away in the next breath as to routing when there is competition over any part of a through route. As the great bulk of traffic does move over lines where at least a part of the route is competitive the right to make exceptions and regulations is nullified. The proviso should be repealed and the Interstate Commerce Commission should be given full power to prescribe exceptions and regulations as to routing whether over competitive or non-competitive routes either in whole or in part.

(*z-6*) *Federal and State Commissions.*

Just as the American people have accepted the principle of an indestructible Union of indestructible States, so the shipping public is demanding an indestructible Interstate Commerce Commission to regulate our national commerce and indestructible State commissions to regulate our purely local State commerce. We must not either localize our national commerce by regional mergers or regional Commissioners or nationalize our local commerce by undue interference with State regulation of State local Intrastate commerce by the Interstate Commerce Commission. Senator Kellogg (at p. 350) asked Mr. Clark, "is it not true that very few rate adjustments can be localized," and

Mr. Clark answered, "it is true." Neither one nor the other should unduly discriminate against the other. There should be enacted into law in express, unmistakable written words the principle of the Shreveport case (pp. 353-4) and what was said at an earlier date in the case of Welton vs. Missouri (91 U. S., 275, Mr. Justice Field at p. 282). There is no real difficulty in harmonizing both and establishing a proper relationship between them (p. 236).

(*z-7*) *The So-Called Weak Roads.*

There has been created an atmosphere of hysteria as to the so-called weak roads, largely the result of the activities of such organizations as the Association of Owners of Railroad Securities. These so-called weak roads have been placed, as it were, in an economic aeroplane, "up in the air," to remove them from close observation. They must be brought back "to earth" for closer scrutiny. They must be released from the darkened ward wherein are placed sick economic patients and brought back into the economic sunlight for practical common sense treatment.

The long and loud talk about the so-called weak roads has had a physchological effect upon the masses until some of the public have lost their balance and acquired delusions, illusions and hallucinations in respect thereto. The representatives of holders of securities in the so-called weak roads have shed tears so copiously that emotionalism has made the world also weep briny drops. There has been a regular economic camp meeting where boisterous shouting has taken the place of calm deliberation.

The so-called weak roads problem has merits and demerits. Some phases of the problem are to be solved by gentle means and others by the most drastic.

Mr. Clark shows (pp. 245-6) why we have so-called weak roads, as follows: "No railroad has, in my judgment, ever been embarrassed financially if the proceeds from the sale

of its stocks and bonds have been devoted to the development of the property. It is the diversion of the proceeds of these securities to other channels that leaves the railroad with a burden of debt that it can not carry." Mr. Clark pointed out (p. 270) a few roads such as the Rock Island, Frisco, C. H. & D., Pere Marquette, Wabash & Pittsburgh Terminal, and (p. 269) the New Haven.

Mr. Clark also stated (p. 249) that: "Well, I did not go so far as to suggest that the more expensive one should earn dividends, because there are some of them that never can earn dividends on the present capital under any rate that would be considered." The same thought had been expressed by the Supreme Court of the United States in the case of Covington Turnpike Co. vs. Sandford (164 U. S., 578). In this case Mr. Justice Field said (pp. 596-7): "It can not be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn

dividends. The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation can not maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant' turnpike upon payment of such tolls as in view of the nature and value of the service rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable. That inquiry also involves other considerations, such, for instance, as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise. In short, each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway, are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law."

That Senator Underwood had similar ideas in mind is shown by the following colloquy (pp. 244-5):

> "*Senator Underwood:* * * * If the capitalization is based on watered stock or fictitious issues of se-

curities then there is a danger to the property which is unnecessary.

"*Commissioner Clark:* Undoubtedly."

Mr. McCrea, President of the Pennsylvania Railroad, in his evidence before the Interstate Commerce Commission In the Matter of Proposed Advance in Freight Rates by Carriers (Ten Per Cent Case) of 1910,* testified (pp. 2324-25, Senate Document No. 725, 61st Congress, 3d Session), as follows:

"*Mr. Atwood:* Would you think it right for this Commission by its order to fix rates and say that as to those rates they would tax the shipping community, to the end that there might be upheld and maintained a railroad that might be in need as the result of maladministration and overcapitalization?

"*Mr. McCrea:* I certainly do not. I think that a road for which there never was any urgent need, which was not properly financed, which was not conservatively managed—I do not think that that road should have any more consideration than the results of its operation would justify."

Mr. Clark has pointed out (pp. 245-6) with wonderful clearness the disaster resulting from the diversion of the proceeds of issued capital and has suggested (p. 245) a remedy by a supervision of expenditures.

Every person at all familiar with the transportation problem should bear in mind the many cases of disaster resulting from unwise and imprudent issue and diversion of securities and the proceeds thereof and allowing merger and consolidation to run wild and the making of unconscionable leases and guaranteeing securities where such guarantee should not have been given.

In Consolidations and Combinations of Carriers (July 11, 1907), 12 I. C. C., 277, the Commission stated (at pp.

*20 I. C. C. R., 243 and 307.

300-301): "Taking the original cost of the property as it stood upon the books of the Alton Company December 31, 1898, as $39,935,887, adding the amount which appears by the testimony of Mr. Harriman, Mr. Felton, and Mr. Hillard to have been spent upon the property out of the new capital issued after Mr. Harriman and his associates obtained control of the road, to wit, about $18,000,000 (including the cost of the 58 miles of the Peoria road at $3,000,000), it shows that the foregoing liabilities of over $113,894,000 were placed upon property which had originally cost approximately fifty-eight millions, or an increase of stock and liabilities upon the road for which not a dollar of tangible property had been added of practically $56,000,000.

"It was admitted by Mr. Harriman that there was about sixty millions of stock and liabilities issued against which no property had been acquired, and this is undoubtedly an accurate estimate. It further appears by the testimony of Mr. Hillard that since the Harriman control has ended and the road was turned over to the Rock Island the company has been compelled to issue $2,260,000 of car trust notes to acquire equipment needed in the business of the company; that the present management found the company without any money to buy necessary equipment or to build 34 miles of railroad which the company had contemplated constructing and on which the Harriman management had placed a mortgage, sold the bonds, but had left no funds in the treasury to complete.

"From this brief synopsis of the exploitation of the Chicago & Alton, it is evident that its history is rich in illustrations of various methods of indefensible financing. First came the profit to the stockholders arising out of the sale to themselves of $32,000,000 of bonds at 65, which sold for several succeeding years for 82⅛ to 94. Second came

the 30 per cent dividend based on amounts expended from income for improvements, much of it nearly thirty years before, and recently capitalized. Third came the psuedo transfer to Stanton, and his contract under which the new company paid $10,000,000 in cash for preferred stock which had cost less than $7,000,000. Fourth came the conversion of 183,224 shares of common stock in the *Railroad* Company into 195,428 shares of common stock plus 194,890 shares of the preferred stock in the *Railway* Company, part of which was sold to the Union Pacific at 86½ a share. Fifth came the sale of the St. Louis, Peoria & Northern for $3,000,000 cash. Sixth came whatever interest the syndicate may have had in the sale to Kuhn, Loeb & Co., of $22,000,000 of bonds at 60 cents on the dollar. Seventh came the fee of $100,000 to Mr. Harriman for financing the enterprise. This analysis is no doubt incomplete, but it is suggestive.

"By way of justification or excuse we are told that the methods of the financing of railroads which prevailed in the year 1900 are now obsolete, owing to a higher degree of conscientiousness among financiers; and moreover, that the Chicago & Alton should not be regarded as an isolated instance, inasmuch as it was dealt with much as many other roads were at that period.

"The first of these statements is, we trust, true; the latter statement is not calculated to uphold the value of American railroad securities."

In The New England Investigation (June 20, 1913), 27 I. C. C., 560, the Commission stated (at page 578): "June 30, 1903, the total capitalization of the New Haven Company was approximately $93,000,000, of which $79,000000 was stock and $14,000,000 was bonds. The mileage then operated was 2,040 miles. On June 30, 1912, the capitalization, including stock premiums, was $417,000,000, an in-

crease of $324,000,000 while the operated mileage was 2,090, an increase of 50 miles.

"The bonds and notes of the New Haven Company had been during this period ordinarily issued at not less than par; the stock was sold at considerably above par. About $21,000,000 of the stock reported by the New Haven Company as outstanding had been in fact issued to the New England Navigation Company, one of its subsidiary companies, by which it was held, so that this stock is still virtually in the treasury of the parent company. Disregarding this stock, treating its notes and bonds as issued at par, and including the premiums upon the capital stock which has actually gone into the hands of the public, the New Haven received during the nine years under consideration from the issue of stock and securities about $340,000,000.

"While, the New Haven operated 2,040 miles in 1903, it only owned of this operated mileage 438 miles. During the nine years this owned mileage was increased by about 800 miles, and the New Haven Company expended approximately $40,000,000 in acquiring this additional owned mileage.

"It expended during the nine years something over $96,000,000 upon its railroad for betterments and equipment, making a total of $136,000,000 devoted to its railroad property proper.

"This would leave the sum of $204,000,000, which in nine years had been expended in operations outside its railroad sphere. This fact of itself is a most significant one which, standing alone, might well require explanation. Attention is here directed to some of the purposes for which and the maner in which this vast sum has been invested." The Commission further stated (at pages 616-617): "In conclusion this Commission desires to call attention to one lesson from this investigation of national application.

"No student of the railroad problem can doubt that a most prolific source of financial disaster and complication to railroads in the past has been the desire and ability of railroad managers to engage in enterprises outside the legitimate operation of their railroads, especially by the acquisition of other railroads and their securities. The evil which results, first, to the investing public, and finally, to the general public, can not be corrected after the transaction has taken place; it can be easily and effectively prohibited. In our opinion the following propositions lie at the foundation of all adequate regulation of interstate railroads:

"1. Every interstate railroad should be prohibited from expending money or incurring liability or acquiring property not in the operation of its railroad or in the legitimate improvement, extension, or development of that railroad.

"2. No interstate railroad should be permitted to lease or purchase any other railroad, nor to acquire the stocks or securities of any other railroad, nor to guarantee the same, directly or indirectly, without the approval of the Federal Government.

"3. No stocks or bonds should be issued by an interstate railroad except for the purposes sanctioned in the two preceding paragraphs, and none should be issued without the approval of the Federal Government.

"It may be unwise to attempt to specify the price at which and the manner in which railroad stocks and securities shall be disposed of, but it is easy and safe to define the purpose for which they may be issued and to confine the expenditure of the money realized to that purpose. That such a measure of regulation is necessary, and that it can only be administered through the national government, is the necessary conclusion from the facts developed in this proceeding."

In St. Louis and San Francisco Railroad Investigation January 20, 1914)) 29 I. C. C., 139, the Commission stated

(at p. 153): 'The policy of the Frisco in the acquisition of new lines at prices greatly in excess of construction costs and the sale of its funded debt securities at extravagant rates of discount, including the payment of premiums on retired issues and commissions to banks and bankers on such issues, the investment in stocks of industrial companies on which no dividends have been paid, the assumption of heavy fixed charges for its Texas lines as well as for the Chicago & Eastern Illinois Railroad far greater than its returns therefrom, and payment of excessive charges upon the investment in and use of terminal and coal properties have resulted in the net revenue of the Frisco being absorbed by such charges in a sum which approximates between $3,500,000 and $4,000,000 per annum."

In re Financial Transactions of the New York, New Haven & Hartford Railroad Company (July 11, 1914), 31 I. C. C., 32, the Commission stated (at page 33): "The result of our research into the financial workings of the former management of the New Haven system has been to disclose one of the most glaring instances of maladministration revealed in all the history of American railroading.

"* * * The difficulties under which this railroad system has labored in the past are internal and wholly due to its own mismanagement. Its troubles have not arisen because of regulation by governmental authority. Its greatest losses and most costly blunders were made in attempting to circumvent governmental regulation and to extend its domination beyond the limits fixed by law." The Commission further stated (at pp. 68-69): "This investigation has demonstrated that the monopoly theory of those controlling the New Haven was unsound and mischievous in its effects. To achieve such monopoly meant the reckless and scandalous expenditure of money; it meant the attempt to control public opinion; cor-

ruption of government; the attempt to pervert the political and economic instincts of the people in insolent defiance of law. Through exposure of the methods of this monopoly the invisible government which has gone far in its efforts to dominate New England has been made visible. It has been clearly proven how public opinion was distorted; how officials who were needed and who could be bought were bought; how newspapers that could be subsidized were subsidized; how a college professor and publicists secretly accepted money from the New Haven while masking as a representative of a great American university and as the guardians of the interests of the people; how agencies of information to the public were prostituted wherever they could be prostituted in order to carry out a scheme of private transportation monopoly imperial in its scope."

In *re* Financial Transactions, History and Operation of the Chicago, Rock Island & Pacific Railway Company (July 31, 1915), 36 I. C. C., 43, the Commission said (at p. 61): "The property of the railway company will be called upon for many years to make up the drain upon its resources resulting from transactions outside the proper sphere in which stockholders had a right to suppose their moneys were invested."

In Pere Marquette R. R. Co. and C. H. & D. Railway Company (March 13, 1917), 44 I. C. C., 1, the Commission in its summary and conclusion (at pp. 222-223) said: "The exploitation in 1903, 1904, and 1905 of the Pere Marquette and the C. H. & D. was not an incident of railroad construction. The properties had long been established. Whatever control or regulation of the issue of railroad securities was exercised by the States in which these roads operate was inadequate to prevent the exploiting or to forestall subsequent hasty and unwise reorganization. To the extent that these flotations ultimately lodged in the hands

of innocent investors, whether here or abroad, the public was deeply wronged. Whatever control or regulation was had of the properties and operations of the two roads was not sufficient to keep them in condition to satisfactorily serve the population dependent upon them. The result has been the same with each, financial disaster to the carriers, serious loss to the holders of their securities, deterioration of their physical properties, and a marked impairment of ability to perform their functions as public servants.

"Nothing disclosed in the record before us is to be more regretted than the readiness of great banking institutions in our financial centers to loan enormous sums of money upon exceedingly precarious security in aid of such schemes as have been devised in the wrecking of these railroads. Not only this, but the high officers of such institutions, while acting ostensibly as directors of the railroads, have in fact been little more than tools and dummies for the promoters. The trustees of other people's money seem to have had little compunction about violations of their trusts for the benefit of the promoters, and at their demand.

"Can the like of what has befallen these two roads be made impossible hereafter? Perhaps not entirely, so long as financial circles continue complaisant toward financial exploitations which prove successful. But it will help if minority stockholders are more watchful of their interests and if bondholders assert their rights before their security fades away for lack of upkeep, purposely neglected in order to pay interest and dividends unearned. It would, in our opinion, render such exploitation more difficult if the issuance and marketing of all securities of common carriers were subject to Federal regulation. As to that we renew the recommendations repeatedly made to the Congress in our annual reports. We also point to the lesson, here again taught, that access to correspondence files is indispensable

for a thorough and accurate understanding of the motives and purposes which underlie the formal entries made in accounts and records.

"Unwise management contributed to the downfall of these roads, but breach of trust by corporate officials, often for personal gain, was the main cause here, as in the records developed in other investigations. * * * That downfall, with its deplorable consequences, can be traced only to betrayal within, and not to compulsion from without. Neither rivalry, nor rate level, nor regulation, nor all combined, can be found on this record to have contributed in any appreciable degree to the disaster."

In Wabash Pittsburgh Terminal Investigation (December 17, 1917), 48 I. C. C., 96, the Commission said (at page 144): "The result of the operation of the Terminal to date shows clearly that the building of this property was a poor business venture. Fifty millions in bonds were issued against a railroad 60 miles in length and which cost about $25,000,000. The par value of its first mortgage bonds alone exceeded by approximately $5,000,000 the actual amount of cash expended for property devoted to transportation at the commencement of the receivership. Notwithstanding the assurance of traffic contained in its traffic and trackage agreements, and the 25 per cent guaranty of the Wheeling and Wabash, the Terminal failed to secure sufficient tonnage to enable it to pay interest on its first mortgage bonds.

"As has been already shown in detail, the Terminal was not only greatly overcapitalized but the percentage of its funded debt, 83.04 per cent, to total capital obligations was unusually high. Against an actual cash investment in road and equipment and securities of affiliated companies of approximately $38,000,000, there was outstanding, when receivers were appointed, over $61,000,000 in securities.

"This case illustrates again the great need for control of security issues and emphasizes the wisdom of the Commission's requirement which has been in effect since 1907. that the charges to the accounts reflecting the carriers' investment in road and equipment shall be based upon the cash cost of property."

In Proposed Increases in New England (April 16, 1918), 49 I. C. C., 421, the Commission said (at pp. 430-431): "In a word, both the present corporate structure and the financial history of this so-called 'railroad' shows that it now is and for some time has been everything that a railroad ought *not* to be. With one of the finest opportunities in the world for successful railroading; with a property which for years prior to 1903 had been managed conservatively and steadily, if not very progressively, its present status is such that neither its present management nor the regulating commissions under whose jurisdiction it falls can do anything more than make the roughest kind of guess as to their proper course of procedure. It is impossible to ascertain and state with even approximate accuracy the facts which ought to guide both managers and public officials to sound and just conclusions. Its condition is the result of a decade of atempting to run a great railroad property regardless of either ethics or mathematics. See The New England Investigation, 27 I. C. C., 560, 607.

"The following excerpt from our report in Financial Invesigation of N. Y., N. H. & H. R. R. Co., 31 I. C. C., 32, 34, states some of the facts in its career:

> " 'Marked features and significant incidents in the loose, extravagant, and improvident administration of the finances of the New Haven as shown in this investigation are the Boston & Maine despoilment; the iniquity of the Westchester acquisition; the double price paid for the Rhode Island trolleys; the recklessness

in the purchase of Connecticut and Massachusetts trolleys at prices exorbitantly in excess of their market value; the unwarranted expenditure of large amounts in "educating public opinion"; the disposition, without knowledge, of the directors, of hundreds of thousands of dollars for influencing public sentiment; the habitual payment of unitemized vouchers without any clear specification of details; the confusing interrelation of the principal company and its subsidiaries and consequent complication of accounts; the practice of financial legerdemain in issuing large blocks of New Haven stock for notes of the New England Navigation Company, and manipulating these securities back and forth; fictitious sales of New Haven stock to friendly parties with the design of boosting the stock and unloading on the public at the higher "market price"; the unlawful diversion of corporate funds to political organizations; the scattering of retainers to attorneys of five States who rendered no itemized bills for services and who conducted no litigation to which the railroad was a party; extensive use of a paid lobby in matters as to which the directors claim to have no information; the attempt to control utterances of the press by subsidizing reporters; payment of money and the profligate issue of free passes to legislators and their friends; the investment of $400,000 in securities of a New England newspaper; the regular employment of political bosses in Rhode Island and other States, not for the purpose of having them perform any service but to prevent them, as Mr. Mellen expressed it, from "becoming active on the other side," the retention of John L. Billard of more than $2,700,000 in a transaction in which he represented the New Haven and into which he invested not a dollar; the inability of Oakleigh Thorne to account for $1,032,000 of the funds of the New Haven intrusted to him in carrying out the Westchester proposition; the story of Mr. Mellen as to the distribution of $1,200,000 for corrupt purposes in bringing about amendments of the Westchester and Port Chester franchises; the domination of all the affairs of this rail-

road by Mr. Morgan and Mr. Mellen and the absolute subordination of other members of the board of directors to the will of these two; the unwarranted increase of the New Haven liabilities from $93,000,000 in 1903 to $417,000,000 in 1913; the increase in floating notes from nothing in 1903 to approximately $40,000,000 in 1913; the indefensible standard of business ethics and the absence of financial acumen displayed by eminent financiers in directing the destinies of this railroad in its attempt to establish a monopoly of the transportation of New England. A combination of all these has resulted in the present deplorable situation in which the affairs of this railroad are involved.'

"For present purposes it would not be profitable to undertake a complete analysis of the financial status of the New Haven system." The Commission further stated (at pages 433-434): "But the gist of the New Haven's troubles is found in its so-called 'other investments.' The amount of these is, as already indicated, impossible to state. Various computations place them all the way from about $150,000,000 to about $227,000,000. The rate of return shown on its railroad property is thus necessarily subject to variation. Taking the larger figure of $227,000,000, the New Haven is receiving an annual average income of about 1 per cent on its outside investments; on a large part thereof, no income whatever is received. If a part of these outside investments be deemed absorbed into the railroad property investment, the rate of return on the railroad property is diminished proportionately and the return on the outside investments slightly increased. But making due allowance for all these variations and uncertainties, it is nearly accurate to say that the New Haven as an investment enterprise has now about $200,000,000 invested in outside properties, yielding a return of less than

2 per cent per annum. Manifestly, a large part of this 'investment' must be charged off as loss.

"The representatives of the New Haven would have us ignore, or pass very lightly over, the return shown upon its property used for carrier purposes. They lay emphasis upon the fact that its stockholders for four years have had no dividends; that the corporation is in grave danger of a receivership. They ask us in substance to make good to the investors all, or a large part, of the losses incurred in the reckless and lawless mismanagement above outlined by imposing additional rates upon the patrons of the road. This we can not do. Money thrown away, dishonestly or with wanton recklessness, or foolishly lost in nonrailroad enterprises, is not money put to public use upon which the rate payers are bound in law and in conscience to make a return.

"We do not overlook that under our present form of corporate management the great majority of the stockholders in the New Haven enterprise were even more the victims of the mismanaging directors than were the patrons of the road. It is common knowledge that the directors of these great corporations are in fact selected by banking or other interests in too many instances actuated by motives essentially adverse to the interest of the stockholders toward whom they bear a fiduciary relation. But as long as our public policy is represented by the law as it now is, this Commission must, so far as rate making is concerned, hold stockholders responsible for the mismanagement of directors who, in contemplation of law, are selected by them. Until this Commission, or some other governmental body with adequate power, permanently controls the issue of carrier securities and, within reasonable limitations, the application of the proceeds thereof, stockholders and other investors in carrier securities are certain from time to time

to be subjected to such perils of mismanagement and resultant losses as have accrued to the stockholders of the New Haven, the Rock Island, the Pere Marquette, the Cincinnati, Hamilton & Dayton and others. We say this with reference to future conditions, not overlooking the adequate, but temporary, safeguards now obtaining under federal control.

"After a railroad corporation like the New Haven and some of our other well-located and prosperous railroads has had a long career of business success and reasonably safe management, its stock becomes widely distributed among investors who pay little or no attention to guarding their investments. But this situation fraught with grave danger to the investing public, is one with which the Congress must deal. As the law now is, this Commission is powerless to afford any real remedy for past misdoings or in the future to protect other similar bodies of stockholders from depredations and losses of an analogous kind. We can do no more than investigate and condemn after the evil has been accomplished, and make a 'report' of losses and sufferings which we were powerless under the law to prevent. Private capital invested in carrier companies can not be generally safe under such lack of security regulation as has existed prior to federal control."

"A transportation line," says Mr. Clark (p. 236), "operating by virtue of a public grant and upon which the industrial, commercial and social life of communities depends, *should not be a football of speculation.*" (Italics mine.)

Mr. Clark (p. 235-6) said: "It would serve no good purpose to recite the many instances in comparatively recent years in which, through financial deals for which it is difficult to find any word of excuse, railroad properties have been bankrupted or saddled with almost overwhelming burdens of indebtedness, which have not increased the amount or

value of property devoted to the public service, have not improved the service rendered, *and have on the whole had the effect of increasing the charges for service* (italics mine). There should be some way by which under the law these things could be prevented, or, if not prevented, by which the perpetrators could be required to adequately answer for their acts."

In the judgment of the undersigned it is very necessary, in finding a remedy for the so-called weak roads problem to find out what the evils have been and these are best determined by an analysis of some of the situations that have been presented to the Commission (as late as April 16, 1918) and which are found recorded in their reports, copious extracts from which have been heretofore quoted. There should, therefore, be no misinterpretation of what was said by Mr. Clark as above quoted, because the Commission in the foregoing investigations (in all of which Mr. Clark participated), pointed out the evils and also specified some of the remedies to meet the difficulties. That the only way to provide a remedy is to study the evils existing, was stated by Lord Coke more than 300 years ago in the opinion in Heydon's Case (3 Coke, 7) decided in the year 1584, wherein it is said: "For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law) four things are to be discerned and considered: 1st. What was the Common Law before the making of the Act. 2nd. What was the mischief and defect for which the Common Law did not provide. 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth. And 4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and *to suppress subtle inventions and evasions for continuance of the*

mischief (italics mine) and *pro privato commodo,* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*" Lord Coke there pointed out that the law should be framed to "suppress subtle inventions and evasions" devised for private interest, and that the law should be interpreted "*pro bono publico,*" that is to say, for the public good.

The National Association of Owners of Railroad Securities, through its President, Mr. S. Davies Warfield, presented a statement under date of January 31, 1919, and a supplemental one under date of February 13, 1919. This Association called to its aid a galaxy of eight brilliant lawyers, including Elihu Root, John G. Milburn, John S. Miller, Hugh L. Bond, Jr., Forney Johnston, B. H. Inness Brown, Luther M. Walter and Samuel Untermyer.

The thought running through Mr. Warfield's documents is a "*leveling* of railroad earnings as a *whole*" (p. 26 of the statement of January 31, 1919). The italicised words "*leveling*" and "*as a whole*" are the italics of Mr. Warfield and not of the undersigned. The idea of "leveling" is spoken of by Mr. Warfield at several places in the Statement of January 31, 1919 (pp. 5, 26, 29). "Leveling" is but a form of socialism, the whole scheme of socialism being to pay the rewards of the efficient to the inefficient and take away the rewards from the efficient and give them to the inefficient. No such socialistic idea should find its way into our national law.

Mr. Warfield states (p. 1 of statement of January 31, 1919): "Whether the condition described arose from the exploitation and mismanagement of certain railroads in years past made little difference to present owners of the securities." The burden of Mr. Warfield's statement seems to be the matter of a return on the investment made by present owners of securities in such securities rather than the in-

vestment made by railroad corporations in railroad property, although Mr. Warfield speaks in many places of a return to the railroads on the investments made by the railroad corporations in railroad property.

Mr. Warfield states (at p. 2 in the statement of January 31, 1919) the purpose of his Association: "The purpose of the Association was announced that it would do whatever it properly could to protect investment made in railroad securities by the exercise of the rights belonging to the ownership of such securities." Mr. Warfield thus emphasizes the purposes of the Association to be, not so much the investment made by the railroad in railroad properties, as the investment made by the investors in railroad securities. Mr. Warfield further remarked (p. 28 of the statement of January 31, 1919): "The plan will **insure** a continuation of dividends on the stock of railroads." In this statement the word "**insure**" is placed by Mr. Warfield in bold-faced type. The general idea running through Mr. Warfield's statements is a six per cent return, although Mr. Warfield says in his supplemental statement of February 13, 1919 (at p. 11): "It must not be understood that any railroad would necessarily receive as much as 6 per cent on its property investment account." The words just quoted are placed in italics by Mr. Warfield.

That Mr. Warfield had in mind the subject of a return on bonds and stocks appears from the following quotation from the Supplemental Statement of February 13, 1919 (at p. 1) in relation to two methods before the Senate Committee: "Both methods relate to the form in which the net revenue from railroad rates is applied to the payment of a return on their bonds and stocks."

That Mr. Warfield had no idea of reducing the volume of the securities is apparent from the Supplemental Statement of February 13, 1919 (at p. 1) as follows: "The other

method, reducing excess earnings instead of securities, is contained in our Plan."

That Mr. Warfield's plan did not involve the reduction of securities is apparent from the supplemental statement of February 13, 1919 (at p. 2) wherein he said: "Under the second or the method we propose, present outstanding bonds or stocks remain, but the value of the securities of each railroad is dependent upon the *actual property* they represent and the *precentage of return* each railroad earns entirely through its own efforts, earnings in excess of the reasonable return being taken from it and under rates adjusted to the requirements of the Plan we have submitted." The words in italics are the italics of Mr. Warfield and not of the undersigned.

So that there can be no misunderstanding of the plans of the National Association of Owners of Railroad Securities, as contained in the Statement of January 31, 1919, and the Supplemental Statement of February 13, 1919, the student of the so-called weak roads problem should read each and every line of said Statement and Supplemental Statement and read between the lines. When Congress comes to enact new legislation, it should keep clearly in mind the mischief and defects now existing growing out of the so-called weak roads and to use the words of Lord Coke in Heydon's case (3 Coke, 7) embody language in the law that will unmistakably, "suppress subtle inventions and evasions for continuation of the mischief." The admonition of Lord Coke given in that case more than 300 years ago (in the year 1584) is as sound today as it was then.

That Mr. Warfield wants Congress to "insure" dividends on stock and yet opposes a reduction in capitalization, is apparent. This is a most extraordinary proposition in view of the notorious fact of over capitilization of the so-called weak roads—whose capitilization is out of proportion to

the value of railroad property represented thereby. This is one of the greatest evils to be corrected by the new law.

We will now take up an analysis of some nineteen roads wherein it will be shown that on the investment cost in common stock at about the date of the statement of Mr. Warfield of January 31, 1919, that on a return of 6 per cent on such investment in common stock, the rate of return will range all the way from 18 to 154 per cent. In this analysis the investment cost per share, has been taken from the Commercial and Financial Chronicle:

(1) Chicago Great Western Railroad:	
(a) Par value per share of common stock..	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 29, 1919.....	$8.00
(c) Return of 6 per cent.....	$6.00
(d) Rate of return on foregoing investment cost.....	75%
(2) Denver & Rio Grande Railroad:	
(a) Par value per share of common stock..	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 31, 1919.....	$3.875
(c) Return of 6 per cent.....	$6.00
(d) Rate of return on foregoing investment cost.....	154%
(3) Erie Railroad:	
(a) Par value per share of common stock..	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 31, 1919.....	$16.25
(c) Return of 6 per cent.....	$6.00
(d) Rate of return on foregoing investment cost.....	36%

(4) Kansas City Southern Railroad:	
(a) Par value per share of common stock..	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 30, 1919	$17.00
(c) Return of 6 per cent.....	$6.00
(d) Rate of return on foregoing investment cost	35%
(5) Minneapolis & St. Louis Railroad:	
(a) Par value per share of common stock new	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 29, 1919.....	$10.25
(c) Return of 6 per cent.....	$6.00
(d) Rate of return on foregoing investment cost	59%
(6) Missouri, Kansas & Texas Railroad:	
(a) Par value per share of common stock..	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 31, 1919.....	$5.00
(c) Return of 6 per cent.....	$6.00
(d) Rate of return on foregoing investment cost	120%
(7) New York, New Haven & Hartford Railroad:	
(a) Par value per share of common stock..	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 31, 1919.....	$28.50
(c) Return of 6 per cent.....	$6.00
(d) Rate of return on foregoing investment cost	21%
(8) New York, Ontario & Western Railroad:	
(a) Par value per share of common stock..	$100.00

(b) Investment cost per share of common stock on the New York Stock Exchange, January 31, 1919	$20.00
(c) Return of 6 per cent	$6.00
(d) Rate of return on foregoing investment cost	30%
(9) Pere Marquette Railroad:	
(a) Par value per share of voting trust ctfs.	$100.00
(b) Investment cost per share of voting trust ctfs. on the New York Stock Exchange, January 31, 1919	$13.00
(c) Return of 6 per cent	$6.00
(d) Rate of return on foregoing investment cost	46%
(10) St. Louis-San Francisco Railroad:	
(a) Par value per share of trust ctfs.	$100.00
(b) Investment cost per share of trust ctfs. on the New York Stock Exchange, January 31, 1919	$12.125
(c) Return of 6 per cent	$6.00
(d) Rate of return on foregoing investment cost	49%
(11) St. Louis Southwestern Railroad:	
(a) Par value per share of common stock	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 28, 1919	$17.00
(c) Return of 6 per cent	$6.00
(d) Rate of return on foregoing investment cost	35%
(12) Seaboard Air Line Railroad:	
(a) Par value per share of common stock	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 30, 1919	$8.00
(c) Return of 6 per cent	$6.00

(d) Rate of return on foregoing investment cost	75%
(13) Southern Railway:	
(a) Par value per share of common stock	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 31, 1919	$26.75
(c) Return of 6 per cent	$6.00
(d) Rate of return on foregoing investment cost	22%
(14) Texas & Pacific Railroad:	
(a) Par value per share of common stock	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 31, 1919	$33.50
(c) Return of 6 per cent	$6.00
(d) Rate of return on foregoing investment cost	18%
(15) Wabash Railroad:	
(a) Par value per share of common stock	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 31, 1919	$7.875
(c) Return of 6 per cent	$6.00
(d) Rate of return on foregoing investment cost	76%
(16) Western Maryland Railroad:	
(a) Par value per share of common stock	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 31, 1919	$10.75
(c) Return of 6 per cent	$6.00
(d) Rate of return on foregoing investment cost	55%
(17) Western Pacific Railroad:	
(a) Par value per share of common stock	$100.00

(b) Investment cost per share of common stock on the New York Stock Exchange, January 30, 1919	$18.75
(c) Return of 6 per cent	$6.00
(d) Rate of return on foregoing investment cost	32%
(18) Wheeling & Lake Erie Railroad:	
(a) Par value per share of common stock	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 27, 1919	$8.125
(c) Return of 6 per cent	$6.00
(d) Rate of return on foregoing investment cost	74%
(19) Wisconsin Central Railroad:	
(a) Par value per share of common stock	$100.00
(b) Investment cost per share of common stock on the New York Stock Exchange, January 28, 1919	$33.50
(c) Return of 6 per cent	$6.00
(d) Rate of return on foregoing investment cost	18%

In the past the Interstate Commerce Commission has dealt in a sensible way with the problem of making rates between points of origin and destination served by more than one common carrier. It is commonly said that the first time the matter of a general advance of rates was dealt with was in 1910, while as a matter of fact it came before the Interstate Commerce Commission in 1903 in the Matter of Proposed Advances in Freight Rates (9 I. C. R., 382). This report of the Commission is monumental and one of the many great opinions delivered by Mr. Commissioner Prouty. In dealing with the precise question here discussed, Mr. Commissioner Prouty said (p. 425): "The question now presents itself, must we go further and ex-

amine the financial showing of other lines in determining what rate shall be applied by these lines? The transportation charge must be the same by all routes. Whatever rate is made on grain from Chicago to New York by the Vanderbilt System must determine the rate between that point and the Atlantic Seaboard by all routes. Since the fixing of a rate upon that system indirectly determines what that charge shall be upon all other roads, should we, by reason of this indirect effect, consider the condition of those roads?

"It might be manifestly unfair to select a single advantageous line and make that the standard. We have seen that grain can be transported under actual conditions by the Lake Shore and the New York Central Railroads from Chicago to New York at a cost less than that by most other routes. It would be hardly just to these other routes to compel the putting in of a rate upon that line which was reasonable with respect to it alone and which had no reference to its competitors. Upon the other hand, *it would be equally unfair to the public if the most expensive line were made the standard* (italics mine.) The Southern Railway carries grain to some extent to Norfolk, Virginia. The distance is fully as great: and the rate less than to New York. Its operation is expensive: its tonnage comparatively light: its net earnings per mile only about $1,700. A rate to the Seaboard which upon any fair basis of compensation to investment would be reasonable for that company would be extravagantly high for the trunk lines. *To permit such a rate would be to impose upon the general public the payment of an exorbitant charge* (italics mine).

"We are inclined to think that in the present case the public is entitled to whatever is a reasonable rate by these two great railway systems between the East and the West. The New York Central carries one-half of all the grain which reaches New York. It carries as far as Albany more than

one-half that which reaches Boston, and a considerable portion through to destination. The Pennsylvania lines are not large carriers of grain to New York, but they transport one-half that going to Philadelphia and one-third that taken to Baltimore. The great bulk of export grain which moves to the Atlantic Seaboard passes out through these four ports; and the movement of export grain perhaps roughly indicates that of domestic. *Should these carriers be allowed to impose upon this vast grain traffic an unreasonable charge in order that some other railroad less favorably situated may earn dividends for its stockholders*" (italics mine).

The doctrine laid down in the case just cited has been reiterated in many others and it will be enlightening to quote the first paragraph in the syllabus of the Commercial Club case (19 I. C. C. R., 218) as follows: "This Commission has said that in determining a freight rate which must of necessity be charged by competing lines, it would not look exclusively to that line which could handle the business the cheapest or which was the strongest financially, but would consider as well the weaker rival; yet it has never intimated that the rate should be fixed solely with reference to the weakest line, *and it would certainly be most unjust to the public* (italics mine), in establishing these rates, to consider merely the expensive and circuitous route." The same doctrine was stated in the Receivers' and Shippers' Association case (18 I. C. C., R. 440) affirmed by the Commerce Court under title of the Hooker case (188 Fed. Rep., 242).

During the course of the hearing before the Senate Committee on Interstate Commerce, Senator Cummins inquired whether there was any solution for the problem under existing law and Mr. Clark's answer to this question led to a discussion not only as to a solution under the existing law, but under such new law as might be framed. The dialogue be-

tween Senator Cummins and Mr. Clark was as follows (pp. 281-282):

"*Senator Cummins:* And there was no solution of the problem under the existing law, was there?

"*Commissioner Clark:* Except as the Commission has solved it by saying that it would not fix those rates on the basis of the cost of service by the shortest and best-equipped line, or the richest line, but would take into consideration the needs of the other line.

Senator Cummins: That is true; and that resulted in giving to one railroad more than it ought to have viewed from the standpoint that I think most people occupy, and giving to another railroad less than it ought to have for its service, did it not?

"*Commissioner Clark:* I think so; yes.

"*Senator Cummins:* Now, the only way in which that element in the former problem can be removed is by absorption, is it not?—combination of the railroads of the country?

"*Commissioner Clark:* That would greatly simplify it, because then they could utilize the most economical line, and still they would get the earnings of both.

"*Senator Cummins:* And you are a thoroughgoing believer in the concentration or consolidation of the railways of the country into comparatively few systems?

"*Commissioner Clark:* I am; yes, sir.

"*Senator Cummins:* But you have no hope, have you, that the railroads will voluntarily enter into such consolidation, doing full justice to the smaller and weaker roads?

"*Commissioner Clark:* Oh, I think that there would be a very strong tendency in that direction and that it would gradually grow and that there would be a very large number of absorptions and consolidations if it were permitted.

"*Senator Cummins:* Why not do the thing which seems to be necessary, and that will help to accomplish the end we have in view, namely, adequate trans-

portation at the lowest possible cost—and compel the consolidations which are necessary to bring about that result?

"*Commissioner Clark:* I should not object to that at all, although, as I said in response to Senator Townsend's question, I have never considered it from that standpoint.

Senator Cummins: I think your answer was perfectly sound in one way, but it did not present an obstacle that could not be overcome.

"*Commissioner Clark:* "Oh, no."

You can not cure a harelip and you can not supply a leg of blood and flesh when a man loses his leg. You can, however, improve the appearance of the harelip and you can supply a man with a wooden leg. The beauty doctor can improve the personal appearance of the deformed and the surgical supply man can very much improve the efficiency of the man who has lost his leg. We must help the so-called weak roads within the bounds of sound econnomics and common sense but in doing so we must not unduly burden the shipper who in turn passes on the increased cost to the actual consumer. We must not thus increase the high cost of living for the sole purpose of paying dividends on stocks which under no theory of justice or principle of public policy ought to be paid. To pay such dividends is merely paying a reward for wrong doing and to compensate for such torts (the lawyer's language for wrongs). Mr. Justice Holmes (245 U. S., 534) said that "in the end the public pays the damages in most cases of compensated torts."

The recommendations made by Mr. Clark in his testimony before the Senate Committee on Interstate Commerce, those made by the Interstate Commerce Commission in its annual reports to Congress, the many remedies pointed out by the Interstate Commerce Commission in its various in-

vestigations and decisions and the common sense manner in which the Interstate Commerce Commission has dealt with fixing rates as between various competing lines, will go far toward solving the so-called weak roads problem.

To summarize the suggested remedies as to the so-called weak roads and in a measure to enlarge on them, the new law should contain provisions as follows:

(1) To prevent unnecessary railroad building;

(2) To require railroads to extend their lines;

(3) Voluntary and compulsory merger of carrier lines within the limitations laid down by Mr. Clark that this should not extend to the merger or consolidation of more or less paralleling and competing trunk lines:

(4) Voluntary and compulsory pooling of equipment within proper limitations;

(5) Obligation on the part of carriers to furnish equipment;

(6) Power to compel carriers to furnish adequate motive power;

(7) Power to require standardization of equipment and motive power within well-defined limitations;

(8) Voluntary and compulsory common use of terminals;

(9) Most ample, complete and detailed power to supervise service and physical operation;

(10) Power to prescribe both maximum and minimum rates;

(11) Power to regulate the issue, sale, pledge and disposition of all securities;

(12) Power to control all expenditures, including proceeds from the sale of securities and complete and ample power to prevent the diversion of funds;

(13) That a railroad corporation should be prohibited from expending money or incurring liability or acquiring

property not in the operation of its railroad, or for other than legitimate improvement, extension or development of that railroad;

(14) The prohibition of interlocking directors in carrier corporations whether competitive or non-competitive;

(15) Power to prescribe rates to secure adequate revenue in the way of a fair return on the fair value of property devoted to the public service but not for the purpose of raising revenue for the payment of dividends on stock when under all the circumstances such stock is not entitled to dividends;

(16) Full power to prescribe exceptions and regulations as to routing; and

(17) The new law should embody therein the rules as now applied by the Commission under the present law as exemplified In the Matter of Proposed Advance in Freight Rates, the Commercial Club case, the Receivers' and Shippers' Association case and other similar cases decided by the Commission.

In addition, the new law should contain provisions as to the so-called weak roads as follows:

(1) To empower the Commission to determine what proportion the funded debt and stock should bear to the entire issued capital with an express provision that the funded debt should not exceed 60 per cent of the entire issued capital;

(2) The Commission should be given power to take steps itself or to proceed in court to compel the reorganization of a common carrier so that its entire issued capitalization should not exceed the fair value of the property devoted to the public service;

(3) The Interstate Commerce Commission should itself have power to appoint a receiver for a common carrier and provide for the form of its reorganization and specify the terms thereof. Some people have expressed horror at re-

ceiverships, but a receivership does not interfere with the physical operation of a common carrier. It continues to perform its functions as an instrument of interstate commerce, although its corporate capital financial management is temporarily suspended. "I do not think," said Mr. Clark (p. 270), "that the fact that certain impecunious railroads have been forced into bankruptcy affects the credit of a road that is financially sound and solvent." There seems to be no reason why the Interstate Commerce Commission should not be empowered to appoint a receiver for a common carrier when the public interest so demands. Congress has invested the Comptroller of the Currency with power to appoint receivers of national banks by Section 9272 of Barnes' Federal Code of 1919, and has made further provisions in reference thereto by Sections 9278 and 9279;

(4) No voluntary reorganization of a common carrier should be permitted without being first approved by the Interstate Commerce Commision;

(5) In the case of a receivership of a railroad under court proceedings, the Interstate Commerce Commission should act as Master in Chancery just as is provided in Section 7 of the Federal Trade Commission Act of September 26, 1914. The Commission should be given full power to prescribe the terms of reorganization under such receivership;

(6) The Commission should be given power to compel the abandonment of the whole or a part of a line conducted by a common carrier when not in the public interest;

(7) The Commission should be given power to cancel unconscionable leases imposing undue burdens;

(8) The Commision should be given power to prevent a common carrier entering into any leases or purchasing the stock of or assuming the obligations of any other common carrier and power to cancel same;

(9) The new law should provide not merely criminal but civil liability for directors and officers who divert funds of a corporation to purposes other than for which they were raised, or who enter into burdensome obligations and guarantees and unconscionable leases;

(10) The Commission should be given power to compel a carrier to dispose of securities in its treasury which are unnecessary to secure its efficient operation and should supervise the matter of the investment of money in securities where such investment is made for the purpose of creating a reserve fund when the Commission thinks it desirable that a reserve fund should be created; and

(11) The Commission should be given power to initiate rates, and which should supplement the power of the carriers to initiate rates.*

(*z-8*) *Modernizing the Machinery of the Interstate Commerce Commission.*

Interstate commerce is our national commerce, and should therefore, be administered by a national body. A plan has been put forward that the Commission be reorganized and regional commissions created. Nothing more unwise has ever been suggested, and nothing which would do more to destroy confidence in national regulation.

The passage of the new law increasing the powers and functions of the Interstate Commerce Commission will necessarily increase its work and make imperative the enlargement of its machinery. Under the law as it is today, the Commission consists of nine members and is permitted to divide itself into sub-divisions of not less than three members each. The new law ought to provde for increasing its membership from nine to twelve, so as to enable it to work in four sub-divisions. One great fault in the

*The new act, of course, should contain provisions other than those above enumerated as to other subjects than the so-called weak roads.

present law (and which will become a much graver one under the new law), is the absence of a permanent head of the Commission. At it is today the Chairmanship of the Commission rotates from year to year. The undersigned suggests that the Commission shall consist of twelve Commissioners of which there shall be one Chief Commissioner and eleven Associate Comimssioners, to be appointed by the President and confirmed by the Senate. The new law should provide that the Chief Commissioner should be selected with special reference to his administrative and executive ability and should enjoin upon the Chief Commissioner the special duty of expediting business. The present compensation of the commissioners is inadequate and the new law should provide a salary of $12,500 a year for the Chief Commissioner and $12,000 a year for each Associate Commissioner. The law should further provide that when a commissioner shall have served not less than ten consecutive years and had reached the age of seventy years, he should retire upon full pay. The compensation of the Secretary of the Commission should be increased from $5,000 to $7,500 per year.

In view of the great activities of the Commission it is now imposible, except in rare cases, for a Commissioner or Commissioners to hear testimony in person. Every carrier and shipper would prefer that a member of the Commission should sit in a case. As a consequence, testimony is heard usually by a single examiner. In recent years in a great number of cases the examiner is required to prepare a tentative report and parties to the proceeding are allowed to file exceptions and the case is argued before the Commission or a subdivision thereof on such exceptions. This system is not calculated to bring the best results. The law should provide for the appointment by the President with the advice and consent of the Senate, of twenty-four Deputy Commissioners at a salary of $10,000 each per

year, with the provision that after not less than ten years consecutive service and upon arriving at the age of seventy years they should retire on full pay. The law should specifically provide that in any and all cases where a tentative report is to be submitted that the case should be heard by three Deputy Commissioners. To their tentative report, of course, exceptions could be filed, and the matter presented to the Commission as is now the practice.

The idea of Deputy Commissioners was suggested by Senator Kellogg and Mr. Clark saw in it great possibilities as is shown by the following colloquy (p. 349):

> "*Senator Kellogg:* Let me ask you right there, Mr. Clark, if I do not interrupt you, what do you think of the plan for the Commission having certain subsidiary officers or commissioners, if I may call them such—not commissioners having the same authority that you have, but representing the commission in different parts of the country—to whom people could appeal for relief, or to state their grievances, or lay before the local commissioners things that they wanted remedied?
>
> "*Commissioner Clark:* I have thought some of that and am thinking some of it now, Senator, and *I think that plan contains possibilities of great helpfulness and great good, if we can get the right men.*" (Italics mine.)

These Deputy Commissioners should be men as fully qualified as members of the Commission. They should be mature men of the world just as are the commissioners. The cases presented to the Commission are of nation-wide importance and set nation-wide precedents, and it is asking too much that an examiner of the Commission should alone hear and submit a tentative report in a case. It may be suggested that the examiner might confer with other examiners or with a member of the Commission, but such other examiners or member of the Commission has not

heard the case. Primarily the evidence should not be presented to one human mind but should be presented to three Deputy Commissioners, so that the case may be looked at from the various attitudes of various minds. Mr. Clark was opposed to placing the rate making power in the hands of a cabinet officer on this ground and his objection to a cabinet officer fixing rates would apply equally to rates being primarily acted upon by a single examiner. The following dialogue brings out the idea (p. 257):

> "*Senator Watson:* Has your commission considered the question of whether or not you favor one man at the head of the railroad transportation system of the country, with a place in the Cabinet?
>
> "*Commissioner Clark:* Yes; we have talked on that.
>
> "*Senator Watson:* May I ask what are your views about that?
>
> "*Commissioner Clark:* Well, I do not think that is a desirable plan.
>
> "*Senator Watson:* Why?
>
> "*Commissioner Clark:* It was suggested the other day by the Director General that one man could make up his mind somewhat quicker than a commission—
>
> "*Senator Watson* (interposing): Yes; and that is the reason I am asking you the question.
>
> "*Commissioner Clark:* And there is no doubt that if you have a man who has the capacity for making up his mind at all, he can make up his mind more quickly than can several men; *but we think that several minds studying a question, and with an effort to bring their originally conflicting views into harmony, and considering the views of each other, are much more calculated to reach the right result.*" (Italics mine.)

(*z-9*) *Interpretation, Construction and Application of the Act.*

The general rules of law which in the past have controlled the interpretation, construction and application

of statutes have too often been linguistic, formal and machine-like and not based on practical common sense. Mr. Justice Oliver Wendell Holmes, in his classic on the Common Law (at page 36) stated that "the law is administered by able and experienced men, who know too much to sacrifice common sense to a syllogism." It is well to embody this as a rule in the written law as a standing admonition and guide. Wurzel (Science of Legal Method, at page 333), pointed out that there is prevailing a syllogistic method of applying the law. The law should be interpreted, construed and applied not so much by dry syllogistic reasoning as by the experiences of business affairs. In the leading Two Hundred Chests of Tea Case (9 Wheaton, 430), on the question whether low grade black tea was Bohea tea or black tea, Mr. Justice Story (at page 439) said: "It would have been as dangerous as useless, to attempt any other classification, *than that derived from the actual business of human life* (italics mine)."

It is commonly said that the intention of the law should be ascertained from the expressed intention of the law-giver, and the law-giver thus referred to is a legislative body. In a democracy such body is merely a representative of the people and therefore the true underlying purposes of the law should not be gathered from the legislative body, but from the people whose desires are embodied in a statute. Therefore there should be no machine-like interpretation, construction and application of a statute, but the same should be interpreted, construed and applied according to the intention of the people, and the purposes should be ascertained in economic legislation from the economic thoughts of the people. The views here expressed are supported by a number of well known writers. Kohler stated (Science of Legal Method, at

page 189) that statutes are to be interpreted as the products of the entire people of which the legislature is but the organ. He also said that statutes require interpretation because they can not be communicated except by words and that the thoughts are "concealed under the word as under a garment." He also gave it as his view that the thoughts expressed in statutes are by no means those of an individual author, but that "they are the thoughts of mankind itself which the legislator merely has given particular form and expression." Roscoe Pound (Science of Legal Method) said (at page 224): "In the positive stage, the law is regarded not so much as something proceeding from the will of the lawgiver, as something proceeding from society through him; as being the product of economic and social forces working through him and finding expression in his words. Hence the text and the context is no longer held to be an all-sufficient guide."

Transportation is an economic service. When performed by a common carrier by rail, or by water-and-rail, it is regulated by rules embodied in the Interstate Commerce Act which is essentially an economic statute, dealing with an economic problem. Such statute, therefore, should receive an economic interpretation, construction and application.

Beard in his Economic Interpretation of the Constitution of the United States (at page 156) calls attention to the fact that Madison in the tenth number of the Federalist pointed out in no uncertain language that the first and elemental concern of every government is economic and that the chief business of government consists in the control and adjustment of economic interests and that the "regulation" of these various

and interfering interests forms the principal task of modern legislation.

Even without the mandate of a statute the courts are beginning to recognize the principle that human laws operating as they do upon the layman, are not to be interpreted, construed and applied merely by mechanical rules, and that the courts should look to conditions shown from other than judicial sources. This was exemplified in the case of Muller vs. Oregon (208 U. S., 412), wherein Mr. Justice Brewer said (at page 419): "It may not be amiss in the present case, before examining the constitutional question, to notice the course of legislation *as well as expressions of opinion from other than judicial sources* (italics mine). In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin." This same Mr. Brandeis, when he became Mr. Justice Brandeis in delivering the opinion of the Supreme Court of the United States in the great economic case of Luckenbach vs. McCahan Sugar Company (248 U. S., 139, decided December 9, 1918), stated (at page 149) that: "It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice." It is therefore, important that when Congress comes to re-enact the Interstate Commerce Act it should contain within itself a rule that that act and all acts amendatory thereof and supplementary thereto should be given an economic interpretation, construction and application.

In addition such statute should be liberally interpreted, construed and applied to carry out its underlying objects and purposes.

When Congress comes to re-enact the Interstate Com-

merce Act, it should contain within itself for its interpretation, construction and application, rules as follows:

(1) That said Act should be given a practical, common sense interpretation, construction and application;

(2) That said Act should be given an economic interpretation, construction and application; and

(3) That said Act should be liberally interpreted, construed and applied, so as to carry out its underlying objects and purposes; that all cases within its objects, purposes, reason and spirit, should be included within said Act and that cases within the letter and language of said Act but not within its objects, purposes, reason and spirit, should be excluded therefrom.*

(*z-10*) *Interpretation, Construction and Application of Publications.*

The Interstate Commerce Act should contain a provision that rates, rules, regulation and practices contained in publications by common carriers should be stated with certainty and precision, and when not so stated, should be interpreted, construed and applied strictly against the carriers and liberally in favor of the shipper.

(*z-11*) *The Pomerene-Esch Bill.*

There is reproduced in this volume the Pomerene-Esch Bill (by far the best bill so far presented), which may well be used as a skeleton on which to build a recodified and rejuvenated Act to Regulate Commerce. A very few parts of this bill should be omitted and much should be added.

*These rules might well be incorporated into all other statutes pertaining to administrative bodies, whose functions pertain to economic subjects such as business, trade and commerce.

(*z-12*) *In Conclusion.*

Mr. Clark is in no way responsible for the views expressed by the undersigned in this introduction or for the interpretation placed on Mr. Clark's testimony, the undersigned being personally and solely accountable for both. Nearly one hundred per cent of Mr. Clark's suggestions may well be accepted by Congress in enacting the new legislation.

FRANCIS B. JAMES.

Washington, D. C., April 21, 1919.